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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 69.

RECONSTRUCTION FINANCE CORPORATION, PRUDENCE-BONDS CORPORATION, PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, AND THE MARINE MIDLAND TRUST COMPANY OF NEW YORK,

Petitioners,

v.

PRUDENCE SECURITIES ADVISORY GROUP, INDEPENDENT PRUDENCE BONDHOLDERS COMMITTEE, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS PRUDENCE SECURITIES ADVISORY GROUP AND PERCIVAL E. JACKSON AND CLINTON T. ROE; INDEPENDENT PRUDENCE BONDHOLDERS' PROTECTIVE COMMITTEE AND GEORGE M. JAFFIN AND LEONARD KLABER; TENTH SERIES COMMITTEE AND GROSVENOR CALKINS; SIXTEENTH SERIES COMMITTEE AND LATSON & TAMBLYN AND ROGERS & WHITAKER; AND SIXTH AND TWELFTH SERIES COMMITTEE AND SCRIBNER & MILLER AND MARK A. HYMAN AND SAMUEL SILBIGER.

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Opinions Below.

The opinions (R. 319-328) in the Circuit Court of Appeals for the Second Circuit (majority opinion by Swan and Patterson, JJ., and dissenting opinion by A. N. Hand, J.) are reported in 111 F. (2d) 37.

Question Presented.

The question: Did the Circuit Court of Appeals for the Second Circuit act properly and within its authority, after the time to appeal had expired, in dismissing various appeals, taken under Section 250 of the Bankruptcy Act from orders granting allowances to attorneys and parties, because appellants failed to apply for, or secure, allowance of such appeals by the Circuit Court of Appeals?

Statutes and Rules Involved.

The pertinent statutes and rules will be found in the Appendix A, pp. 25-28, *infra*.

Statement.

The reorganization proceeding has been pending since 1934. During the course of the proceeding eighteen separate plans of reorganization and one general plan of reorganization, covering eighteen series of outstanding bonds aggregating over $55,000,000 (R. 193), each series being secured by a separate indenture and having a separate trustee, were confirmed.

A Special Master was appointed, and reported, upon the applications filed for allowances. The recommendations of the Special Master were accepted without substantial change by the District Judge.

The allowances made in the orders from which appeals were taken fell into two categories: first, allowances aggregating $478,912.12 (R. 185) for services and disbursements connected with the reorganization; and second, allowances aggregating $626,097.20 (R. 204) to the corporate trustees and their attorneys for the amounts due to them for "servicing" mortgages and real property under the terms

of eighteen trust indentures securing eighteen series of bonds and other services in the proceeding.

The orders fixing allowances were made and entered on various dates from February 14, 1939 to November 6, 1939 (R. 201-3, 206); the earlier date being the date of the order fixing the allowances to respondents Prudence Securities Advisory Group (hereinafter referred to as Securities Group) Jackson and Roe (R. 1-5), and the later date being the date of the order fixing the allowances to the corporate trustees and their attorneys (R. 166-182).

Petitioners herein attempted to take appeals to the Circuit Court of Appeals for the Second Circuit (R. 92-161, 189, 207-222) from the orders of the District Court which made, denied or deferred payment of the allowances herein, by proceeding on the theory that allowance of the appeals by the Circuit Court of Appeals was unnecessary. None of the appellants sought or obtained leave to appeal from the Circuit Court of Appeals (R. 320).

Fifty-four notices of appeal were filed by 28 different parties. Only two of the appellants—petitioners Reconstruction Finance Corporation (hereinafter referred to as R. F. C.) and the Prudence-Bonds Corporation (hereinafter referred to as the New Corporation)—sought to reduce the allowances (R. 92-141). Ten appellants sought allowances which the District Judge had denied *in toto* (R. 142, 145, 147, 153, 158). Sixteen, including petitioners President and Directors of the Manhattan Company (hereinafter referred to as Manhattan Company) and Marine Midland Trust Company of New York (hereinafter referred to as Marine Midland), sought increased allowances (R. 143, 146, 148, 151, 154, 156, 159, 160, 216-222).

These appeals were taken in two groups. The first group, including all appeals from the orders granting allowances to respondents, were consolidated by order of the Circuit Court of Appeals dated March 22, 1939 (R. 252), which was after the expiration of the time within which an appeal could be taken from the order making allowances to respondents

Securities Group, Jackson and Roe.[1] This order was made "without prejudice to a motion to dismiss said appeals" (R. 252). The second group of appeals were independently consolidated (but not with those of the first group) by order dated January 8, 1940.

The formal motion of respondents Securities Group, Jackson and Roe to dismiss the appeals of petitioners New Corporation and R. F. C. (these being the only appeals attempted from the order granting allowances to said respondents) was made November 30, 1939 (R. 276-279). The Circuit Court of Appeals for the Second Circuit, refusing to follow the opinion of the Circuit Court of Appeals for the Seventh Circuit in *In re Albert Dickinson Co.*, 104 F. (2d) 771, and adhering to its decision in *London* v. *O'Dougherty*, 102 F. (2d) 524, denied the motion by order made December 7, 1939 (R. 279) on the ground that the appeals had properly been taken as of right and allowance by the Circuit Court of Appeals was unnecessary. Such respondents secured an order from this Court on March 6, 1940, extending to May 6, 1940, their time to apply for a writ of certiorari to review the order of December 7, 1939. (The *Dickinson* case had been argued in this Court in February but had not then been decided.)

The decision in the *Dickinson* case (*Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382), was announced on March 11, 1940. The following day these respondents moved for a re-argument of their motion to dismiss the appeals (R. 287-294). Some of the other respondents also moved to dismiss the appeals from the orders fixing their allowances (R. 294-300).

The Circuit Court of Appeals, by order dated April 23, 1940, granted these motions and dismissed all the appeals

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[1] The order granting allowances to these respondents was made February 14, 1938; copies of said order, with notice of entry, were served upon appellants on February 15, 1938; and proof of service was filed in the Clerk's office within five days. (R. 291)

(R. 330-337). This Court then granted the writ of certiorari which brings up said order of April 23, 1940, for review.

The Circuit Court of Appeals never passed upon the merits of the appeals.

The following petitions for writs of certiorari to review orders making or refusing allowances in this case are awaiting the decision of this Court on this appeal: *Manufacturers Trust Co. et al.* v. *Prudence Securities Advisory Group et al.*, No. 210; *Endelman et al.* v. *Prudence-Bonds Corp. et al.*, No. 211; *Kelby* v. *Prudence Securities Advisory Group et al.*, No. 214; *Prudence Realization Corp.* v. *Prudence-Bonds Corp. et al.*, No. 259; *Davison* v. *Prudence Securities Advisory Group et al.*, No. 273. The pending petition for a writ of certiorari in *Denham* v. *Munson Line, Incorporated*, No. 284, also awaits a determination of the questions presented herein.

Summary of Argument.

This Court has held (*Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382) that an appeal under section 250 of the Bankruptcy Act may be had only upon allowance by the Circuit Court of Appeals, regardless of the amount involved in the order from which the appeal is taken, although appeals from other orders in the proceeding which involve $500 or more may be taken without such allowance.

Under section 250, in conjunction with sections 24 and 25 of the Bankruptcy Act, an appeal from an order allowing compensation for services in proceedings under Chapter X, must be taken by filing a petition for allowance of the appeal with the appellate court within thirty days after service of a copy of the order with notice of entry or forty days after entry of the order, if no notice is served.

As no petitions for leave to appeal were at any time filed with the Circuit Court of Appeals by petitioners and

the other appellants, and no appeals were ever allowed by it, the Circuit Court of Appeals had no jurisdiction to consider the merits of the appeals. Its order of April 23, 1940, dismissing such appeals, was the only course open to it.

General Order in Bankruptcy No. 36 which makes Rule 73 of the Federal Rules of Civil Procedure applicable to appeals in bankruptcy "except as otherwise provided in the Act," does not subject appeals under section 250 to the provisions of Rule 73 because such Rule makes no provision for appeals which require the allowance of the appellate court.

In any event, by its own terms, Rule 73 of the Federal Rules of Civil Procedure is applicable only "when an appeal is permitted by law." An appeal under section 250 is not permitted until the Circuit Court of Appeals has exercised its discretion and granted allowance of the appeal.

Rule 73 was in effect when the *Dickinson* appeal was taken, and its effect was considered. The decision of this Court in that case—that the appeal under section 250 may be taken only upon allowance by the Circuit Court of Appeals—is determinative of the same issue in this case.

The allowance of appeals under section 250 is not a mere formality. The appellate court has a real discretion which should be exercised to prevent undue delay and expense in the consummation of the reorganization. The power of the court should not be whittled away by exceptions.

The *appeal* cannot be *taken* under section 250 without allowance by the appellate court. Failure to secure allowance does not simply affect the scope of the review or the right to be "heard," but there can be no appeal without allowance.

The necessity for allowance of the appeal is jurisdictional. An appeal taken under section 250 without allowance must be dismissed.

Respondents did not waive their objections to the jurisdiction of the appellate court; nor did the question of jurisdiction become *res judicata*.

The *Dickinson* case was not "applied retroactively" by the court below. Even if the *Dickinson* case had never been decided, it is still true that the Circuit Court of Appeals has never secured jurisdiction of these attempted appeals because the statutory requirement of allowance has not been met.

Respondents cannot be deprived of their rights under the statute merely because appellants improvidently relied on the erroneous decision of the Circuit Court of Appeals in another case.

Argument.

1.

The appeal was not properly taken because petitioners failed to apply for or secure its allowance by the appellate court.

Appeals from allowances in proceedings under Chapter X are covered by section 250 of the Bankruptcy Act. This Court has held (*Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, 385) that appeals under this section "may be *had*[2] only at the discretion of the Circuit Court of Appeals" (italics ours), regardless of the amount involved in the order from which the appeal is taken, although appeals from other orders in the proceeding which involve $500 or more may be taken without allowance by the Circuit Court of Appeals.

Section 250 provides that appeals from orders making or refusing allowances "may, in the *manner* and within the time provided for appeals by this Act, be taken to, and allowed by the Circuit Court of Appeals." (Italics ours.)

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[2] In petitioners' brief (pp. 6, 8, 13, 35) it is erroneously stated this Court held in the *Dickinson* case that appeals from orders on allowances may be "heard" only in the discretion of the Circuit Court of Appeals.

The general provisions for appeals under the Act are in sections 24 and 25. Section 24 permits all appeals to be taken without the necessity of allowance, except appeals from orders involving less than $500, which "may be taken only upon allowance of the appellate court." As this is the only provision in the Bankruptcy Act dealing with appeals which require allowance by the Circuit Court of Appeals, it is apparent that the *manner* of taking appeals under section 250 is that which is prescribed under section 24 for appeals from orders involving less than $500. Appeals under section 250 may therefore "be *taken* only upon allowance of the appellate court." (Italics ours.)

The time for taking appeals under the Act is fixed by section 25, which provides that "appeals under this Act to the Circuit Court of Appeals * * * shall be taken within thirty days after written notice to the aggrieved party of the entry of the * * * order * * * complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry."

The orders of the District Court from which petitioners attempted to appeal, were made on various dates from February 14, 1939 to November 6, 1939. The times to appeal from such orders expired on various dates from March 17, 1939, to December 16, 1939; the earlier date being the last day on which appeal from the order making allowances to respondents Securities Group, Jackson and Roe could be filed. No application for leave to appeal was made to the Circuit Court of Appeals, or granted, during this period, *or at any other time.* No appeal was therefore properly taken to the Circuit Court of Appeals, and it was without jurisdiction to consider the merits of the appeals.

Even if the lower court had desired to do so, it had no power to allow the appeal after the expiration of the statutory period. As recently stated by this Court in an analogous situation, "an amendment . . . would be timely only if filed within the period provided by the statute for

filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative not a judicial function" (*Riley Invest. Co.* v. *Commissioner of Internal Revenue,* U. S. Supreme Court, November 12, 1940 (not officially reported), 85 L. Ed. 35, 37).

2.

Rule 73 of the Federal Rules of Civil Procedure is not applicable to appeals under section 250 of the Bankruptcy Act.

General Order in Bankruptcy No. 36, as it was in effect prior to February 13, 1939, provided that appeals under the Bankruptcy Act were regulated "except as otherwise provided in the Act," by the rules governing appeals in equity. When the old Equity Rules were superseded by the new Federal Rules of Civil Procedure on September 16, 1938, appeals in equity had to be taken under Rule 73 of the new Federal Rules of Civil Procedure. This Rule therefore then also became applicable to appeals in bankruptcy, "except as otherwise provided in the Act."

General Order No. 36 was revised (effective as of February 13, 1939) to provide that appeals, "except as otherwise provided in the Act," shall be regulated by the rules governing appeals in civil actions in the United States, including the Rules of Civil Procedure for the District Courts of the United States. This amendment merely changed the form and not the substance of the General Order, since, as indicated above, the new Federal Rules had previously become applicable to appeals in bankruptcy, "except as otherwise provided in the Act."

As Rule 73 makes no provision for appeals which can be taken only upon allowance of the appellate court, it is clear that appeals under section 250, as well as appeals under section 24 which require allowance, are within the exceptions

"otherwise provided in the Act." This view has been taken by the circuit courts of appeal for the Second Circuit (in this case), the Third Circuit (*In re Donahoe's, Inc.*, 110 F. [2d] 813), the Fourth Circuit (*Milbank, Tweed & Hope* v. *McCue*, 111 F. [2d] 100, 102), and the Tenth Circuit (*Coursey* v. *International Harvester Co.*, 109 F. [2d] 774, 777). This is also the position taken in 2 Collier on Bankruptcy (14th Ed.), page 918. Respondents have found no authority to the contrary.

Even if Rule 73 were held to be applicable to appeals under section 250, by its terms the Rule applies only "when an appeal is permitted by law." Appeals under section 250 are permitted only upon allowance of the appellate court. Since allowance of the appeal was neither sought nor given in this case, the appeal was not "permitted."

Any other construction of the language of General Order No. 36 or Rule 73 would completely nullify the clearly expressed statutory intent to give the Circuit Courts of Appeals discretion as to the appeals to be allowed under section 250.

The changes made in section 24 by the Chandler Act in 1938 were not intended to take away the discretion of the appellate court as to the allowance of appeals, but, as stated by this Court in the *Dickinson* case, 309 U. S. 382, at pages 387-388, they were intended to secure the elimination, so far as practicable, "from section 24 of the old distinctions between 'controversies arising in bankruptcy proceedings' and 'proceedings' in bankruptcy. There was not the slightest intimation of any dissatisfaction with the rule of *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* or with section 250 as it passed the House." (In the *Shulman* case, 301 U. S. 172, this Court held that an appeal requiring allowance by the appellate court must be dismissed if such allowance has not been secured.)

The decision of this Court in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, is direct authority for the proposition that Rule 73 is not applicable to appeals under section 250.

The petition for leave to appeal in that case was filed November 25, 1938 (*In re Albert Dickinson Co.*, 104 F. [2d] 771, 773), *after* the new Federal Rules went into effect on September 16, 1938.[3] The applicability and effect of Rule 73 were argued before this Court (Petitioner's brief in *Dickinson* case, pp. 21 and 33-36). This Court nevertheless held that appeals under section 250 "may be had only at the discretion of the Circuit Court of Appeals" (309 U. S. 382, 385).

The Circuit Court of Appeals also considered the applicability of Rule 73 in the *Dickinson* case. It stated in its opinion (p. 774) that appeals which are allowable only in the discretion of the appellate court under sections 24 and 250 are not covered by Rule 73, but that "all other appeals from orders or decrees entered by the courts of bankruptcy * * * must be taken as appeals in equity suits, namely, as provided for by section 73 of the Rules of Civil Procedure."

3.

The discretion of the appellate court as to the allowance of the appeal is not a mere formality, but is intended to enable the court to prevent frivolous and unnecessary appeals.

The discretion vested in the appellate court to allow appeals under section 250, is a real discretion, to be wisely exercised to save time and money in the administration of

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[3] The new Federal Rules, so far as applicable to appeals in bankruptcy, became effective September 16, 1938 (*supra*, p. 9). Petitioners erroneously state in their brief (pp. 10, 15, 41-42) that such Rules were not applicable at the time of the *Dickinson* appeal and did not become applicable until the revised form of General Order No. 36 became effective on February 13, 1939.

the estate. The allowance of the appeal is not a mere matter of form.[4]

An excellent statement of the necessity for giving the appellate courts discretion in the allowance of appeals from orders making allowances of compensation in reorganization proceedings under Chapter X of the Bankruptcy Act, appears in the *Dickinson* case, 309 U. S. 382, 388-389:

> "The history of fees in corporate reorganizations contains many sordid chapters. One of the purposes of § 77B was to place those fees under more effective control. Buttressing that control was § 77B(c)(9) which, together with former § 24(b), made appeals from compensation orders discretionary with the appellate court. We should not depart from that policy in absence of a clear expression from Congress of its desire for a change. Fee claimants are either officers of the court or fiduciaries, such as members of committees, whose claims for allowance from the estate are based only on service rendered to and benefits received by the estate. Allowance or disallowance involves an exercise of sound discretion by the court based on that statutory standard. Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law—abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. For certainly it seems sound policy to require fiduciaries to make out a *prima facie* case of inequitable treatment in order to be heard before the appellate court. To allow these appeals as a matter of right is to encourage an unseemly parade to the appellate courts and to add to the time and expense of administration. We will not resolve any ambiguities in favor of that alternative."

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[4] The vesting of discretion with the appellate court in the allowance of appeals under section 250 stems back to section 24(b) as amended in 1926. Prior to 1926 no discretion lay with the Court as to the allowance of appeals or petitions to revise. Allowance was a mere matter of form.

To permit appeals to be taken as a matter of right, as proposed by petitioners, and then have the court determine at the hearing on the merits whether it will hear the appeal, would not only violate the express language of sections 24 and 250, but would defeat the purpose for which discretion in the allowance of appeals was vested in the appellate court. The consummation of the reorganization will be delayed, and large expense will be incurred by the estate and the parties, prior to the hearing—only to find, in most cases, that the Circuit Court of Appeals will exercise its discretion by refusing to pass upon the merits of the appeal.

There can be no better illustration than this case of the need for restricting appeals from allowances. The record on this appeal consists of 25 separate volumes of original papers and exhibits, containing approximately 17,000 pages, many of them in compact single-spaced typewriting. (Petitioners, in their motion to dispense with the printing of the record, estimated that it would cost at least $27,500 to print such record.) Many days were spent in the hearings on the applications, before a special master and a judge, both of whom had been in close contact with the services of the applicants as they were being rendered. Full opportunity to be heard was given to the applicants and the interested parties. The Special Master and the Judge were in close accord as to the amounts to be allowed.

After two judicial officers had passed upon the merits of the applications, a single copy of this vast amount of material, in its original typewritten form, was dumped upon three judges of the Circuit Court of Appeals—all of them unfamiliar with the services rendered. Sixteen appellants (including two of the petitioners) sought increased allowances, ten appellants who had been refused allowances below sought allowances from the appellate court, and two appellants (included among the four petitioners) sought to have all the allowances reduced. An adequate review of the merits of all of these claims would involve a detailed exami-

nation of the entire record. This would engage the entire time of the court for weeks. And, in all probability, the final conclusion of the court would not vary much from the results reached by the Special Master and the Judge below.

No question is raised in this case as to the good faith of the appellants who are the petitioners in this Court. But the decision in this case will serve as a precedent for other cases, and if the power of the appellate courts to curb, at their threshold, indiscriminate appeals from orders fixing allowances, is not safeguarded, our appellate courts will literally be swamped with the mass of work thrown upon them. The expense in taking appeals from allowances is small; the record need not be printed, since section 250 provides that the appeal "shall be summarily heard upon the original papers." Unless the appellate courts have power to pass upon the good faith and possible merit of such appeals at their inception, a single creditor or stockholder, regardless of the amount of his claim, may take a frivolous and obstructive appeal which will tie up a proceeding for months, especially if the appeal is taken at the beginning of the summer recess.

4.

Failure to secure allowance of the appeal does not merely affect the scope of review or the right to be heard. No appeal can be *taken* without allowance.

Under the express provisions of sections 250 and 24, it is the "*appeal*" which may be "*taken*" only upon allowance of the appellate court. The "allowance" does not determine the scope of the review; nor does it merely affect the right to be "heard." It is jurisdictional—there is no right to appeal without allowance of the appeal. As this Court stated in the *Dickinson* case (309 U. S. 382, 385): "appeals

from all orders making or refusing allowances of compensation or reimbursement under Chapter X of the Chandler Act may be *had* only at the discretion of the Circuit Court of Appeals." (Italics ours.)

5.

The necessity for allowance of the appeal is jurisdictional. An appeal taken under section 250 of the Bankruptcy Act without allowance must be dismissed.

Where a statute vests in the appellate court discretion as to the allowance of an appeal, it has uniformly been held by this Court that the appeal is not effective, and must be dismissed, unless the allowance of the appeal is secured, or the petition for such allowance is filed, before the time to appeal has expired.

Recent cases in which this Court has held that failure to apply for leave to appeal within the appeal period, where allowance of the appeal is required by statute, is a jurisdictional defect which requires a dismissal of the appeal, are *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172; *Meyer* v. *Kenmore Granville Hotel Co.*, 297 U. S. 160; *McCrone* v. *United States*, 307 U. S. 61; *Alaska Packers Asso.* v. *Pillsbury*, 301 U. S. 174; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399.

In *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, this Court reaffirmed the rule of *Shulman* v. *Wilson-Sheridan Hotel Co., supra*, by stating (p. 385) that the result of the new language found in section 250 "plainly was to carry into the new act the rule of *Shulman* v. *Wilson-Sheridan Hotel Co.*"

The decisions of this Court in *Taylor* v. *Voss*, 271 U. S. 176; *Duryea Power Co.* v. *Sternbergh*, 218 U. S. 299; *Holden* v. *Stratton*, 191 U. S. 115; and *Bryon* v. *Bernheimer*, 181

U. S. 188; which are cited in the dissenting opinion of Judge A. N. Hand (R. 326-328) and in the brief of petitioners (pp. 44-45); are not in conflict with the foregoing propositions. None of these cases involved an appeal under a statute giving discretion to the appellate court as to the allowance of the appeal. Therefore in none of them did this Court hold that a statutory requirement that an appeal would lie only in the discretion of the appellate court could be ignored and an appeal be taken without allowance. All of these cases involved appeals under section 24 of the Bankruptcy Act before such statute gave to the appellate court any discretion as to the allowance of appeals. It was the amendment of section 24 in 1926 which first vested such discretion in the appellate court.[5]

Nor are the decisions in *Crump* v. *Hill*, 104 F. (2d) 36 (Petitioners' brief, pp. 42, 43, 44), and *Crescent Wharf &*

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[5] Petitioners' principal argument is based upon a failure to realize the fundamental change made in section 24(b) by its amendment in 1926. An interesting example of the manner in which they were led astray by their failure to realize the significance of the 1926 amendment appears on page 28 of their brief. After admitting the general proposition which is the core of *respondents'* contention, that "a petition for appeal filed under Section 24(a) [which provides for appeals as of right] could not serve as an application for leave to appeal under Section 24(b) [which provides, since 1926, for allowance only at the discretion of the appellate court], and *vice versa*," and citing (in note 13) a number of cases in support of the proposition, they attempt to graft two exceptions to the general rule, citing the *Holden*, *Duryea* and *Taylor* cases, *supra*, in support of such alleged exceptions. But *all* of the cases cited by them in support of the general proposition dealt with section 24(b) *after* the 1926 amendment, and are squarely in point, while *all* of the cases cited in support of the supposed exceptions dealt with section 24(b) *before* the 1926 amendment and are not exceptions at all, since no discretion was given to the court by the statute involved.

Warehouse Co., 93 F. (2d) 761 (Petitioners' brief, pp. 48-49), authority for appeals requiring allowance at the discretion of the court. Each involved an appeal as of right; allowance was merely a matter of form.

The Circuit Courts of Appeals for every circuit except the Fifth Circuit, have held that failure to secure a required allowance is fatal to the attempted appeal. (See Appendix B, *infra*, pp. 29-30, for the citations of 58 cases, including cases in every circuit, which hold to this effect.) The decision of the Circuit Court of Appeals for the Fifth Circuit in *Shoreland Co.* v. *Conklin*, 30 F. (2d) 489, was in accord with the decisions in all the other circuits, but in *Baxter* v. *Savings Bank*, 92 F. (2d) 404, and *Wilson* v. *Alliance Life Ins.*, 102 F. (2d) 365, the court held to the contrary. In the *Baxter* case, the Circuit Court of Appeals for the Fifth Circuit erroneously cited the *Duryea, Holden* and *Bryon* cases, *supra*, of this Court as authority for its conclusion, although such cases, as hereinbefore stated, involved appeals under section 24 of the Bankruptcy Act before the amendment of 1926 vested discretion in the appellate court as to the allowance of appeals. In the *Wilson* case the court relied entirely upon its own decision in the *Baxter* case. In neither case did the court indicate that it had knowledge of the decisions of this Court in the *Shulman, Meyer, McCrone, Alaska Packers*, and *Toledo Scale* cases, *supra*; nor did the court refer to its own prior decision in the *Shoreland* case, *supra*; or to any of the 58 cases in the other circuits. Actually, in *Crump* v. *Hill, supra* (a decision made after the decisons in the *Baxter* and *Wilson* cases), the same court, passing upon a situation involving an appeal as of right, distinguished such a situation from one involving appeals upon discretionary allowance, and sustained the contention of respondents herein, saying (p. 37), "it will not do to press the analogy here between appeal by notice, and appeal by application and allowance, to the

point of insisting that one is the equivalent of the other, and that as the application for, and the granting of, an appeal cannot be waived, the filing of a notice under Rule 73 cannot be."

Judge Augustus N. Hand, in his dissenting opinion below (R. 326-328), overlooks his own opinion in *In re Glazer's, Inc.*, 66 F. (2d) 513.

In the *Glazer* case, the appellant had filed his petition for leave to appeal with the appellate court within the statutory period. A few days later, but after the expiration of the statutory period to appeal, he discovered that he should have appealed as of right by a petition to a judge of the district court or appellate court. He thereupon petitioned the district judge, who approved and allowed the appeal. The Circuit Court of Appeals, unanimously, in an opinion written by Judge Augustus N. Hand, dismissed the appeal "for lack of jurisdiction," since the filing of the petition with the appellate court had been without effect and the filing of the petition with the district judge had been after the time to appeal had expired. This holding goes beyond the proposition involved herein. In the *Glazer* case the appellant could have appealed as of right and no discretion to refuse the appeal resided in any court or judge. The error consisted merely in filing the petition with the appellate court instead of a judge of the appellate court or district court. No court was deprived of its *discretion* in the allowance of the appeal, and no party was deprived of his right to have the court exercise its *discretion* in allowing the appeal.

6.

Respondents did not waive their objections to the jurisdiction of the appellate court; nor did the question of jurisdiction become *res judicata*.

At the request of respondents, the order consolidating the appeals expressly stated that it was "without prejudice to a motion to dismiss said appeals" (R. 252). Respondents Securities Group, Jackson and Roe subsequently made a formal motion to dismiss the appeals (R. 276-279); secured an order of this Court extending their time to apply for a writ of certiorari to review the order of the Circuit Court of Appeals denying the motion (R. 279-280); before the expiration of such extended time, and after the decision of this Court in the *Dickinson* case, they moved for a reargument of their motion (R. 287-300); and, still before the expiration of the extended time to apply for a writ of certiorari, they secured an order of the Circuit Court of Appeals granting their motion and dismissing the appeals (R. 330-337).

If respondents had expressly consented to the jurisdiction of the Circuit Court of Appeals, such consent would have been ineffective; and when it appeared to the court that it lacked jurisdiction it was its duty to dismiss the appeals on its own motion. *Exporters of Manufacturers' Products* v. *Butterworth-Judson Co.*, 258 U. S. 365; *Mitchell* v. *Maurer*, 293 U. S. 237.

7.

The *Dickinson* case (309 U. S. 382) was not "applied retroactively" by the Court below.

The Court below held that petitioners (appellants below) had failed to meet the statutory conditions precedent to the right to appeal and that the appellate court was therefore without jurisdiction. If the decision in the

Dickinson case had never been made it would still be true that the Circuit Court of Appeals lacks jurisdiction to pass upon the attempted appeals of petitioners because petitione s neither applied for nor secured the necessary allowance of their appeals.

The question is whether the erroneous decision of the Circuit Court of Appeals in *London* v. *O'Dougherty*, 102 F. (2d) 524, while *res judicata* as to the parties in that case, is binding upon these respondents, although they were not parties and never had an opportunity to be heard therein. Shall they be deprived of their rights under section 250 merely because the Circuit Court of Appeals, in another case, misinterpreted the statute?

The rights of respondents under section 250 are substantial: they are not to be subjected to the expense and delay of appeals from the orders making allowances to them unless the appellate court determines upon a preliminary hearing that the appeals have some merit. None of the appellants sought allowance of the appeals from the Circuit Court of Appeals, for they believed it unnecessary. The appellate court at no time exercised the discretion vested in it by statute.

Respondents cannot be deprived of their statutory rights by the erroneous holding of an inferior court in a different case. As Judge Swan said in the opinion below (R. 325), to so hold would "go contrary to elementary principles governing appellate jurisdiction."

Loss through reliance upon the prior decision of an inferior court which later proves to have been erroneous, is unfortunate, and the victim of such reliance may have our sympathy. But he was not compelled to rely upon the decision. He could have protected his rights by actual compliance with the statute and then have appealed, if necessary, to the highest court for the protection of his rights. No matter how much we may sympathize with the man who has slept upon his rights, we cannot, and should

not, give relief to him by depriving others of rights clearly conferred upon them by statute.

The recent decision of this Court in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, is directly in point. The statute provided for an allowance of the appeal by a judge of the district court or appellate court. Nevertheless the Circuit Court of Appeals for the Ninth Circuit, either overlooking the statute or misinterpreting it, promulgated a rule providing that such appeals should be taken by filing a notice of appeal in the office of the clerk of the district court and serving a copy on the adverse party. Appellant, *relying on the rule*, took his appeal in the manner prescribed by it. A motion was made to dismiss the appeal for failure to secure its allowance. The Circuit Court of Appeals denied the motion. This Court reversed the Circuit Court of Appeals on the ground (p. 177) that, allowance of the appeal not having been secured, "the Circuit Court of Appeals was without jurisdiction to entertain the attempted appeal."

8.

The Circuit Court of Appeals is not a court of final appeal, and it may not disregard the provisions of section 250 of the Bankruptcy Act merely because it had previously construed it erroneously in *London* v. *O'Dougherty*, 102 F. (2d) 524.

The rule of *stare decisis* does not enable an intermediate appellate tribunal to follow its own previous decisions after a superior appellate court has determined that such decisions were based on an erroneous view of the law. The doctrine "does not apply with full force prior to decision in the court of last resort" (*Posados* v. *Warner Barnes & Co.*, 279 U. S. 340, 345).

The limitation upon the rule enunciated in the line of cases cited in point IV of petitioners' brief (pp. 50-71) is clearly indicated by the following quotation from the opinion (p. 682, note 9) of this Court in *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (a case on which petitioners place reliance—petitioners' brief, pp. 54-56):

> "Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own."

Justice Cardozo, lately of this Court, also expressed the same view in *The Nature of the Judicial Process,* pp. 147-148, as follows:

> "We will not help out the man who has trusted in the judgment of some inferior court. In his case, the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty. He knows that he has taken a chance, which caution often might have avoided. The judgment of a court of final appeal is felt to stand upon a different basis."

Under section 24(c) of the Bankruptcy Act and section 240(a) of the Judicial Code, this Court has complete power to review any judgment, decree or order of the Circuit Court of Appeals in proceedings under the Bankruptcy Act. The fact that this Court has discretion as to the allowance of review does not make the Circuit Court of Appeals a court of final appeal. To so hold, would mean that each Appellate Term of the New York Supreme Court, and each Appellate Division of the New York Supreme Court, as well as the New York Court of Appeals, are all courts of final appeal, since certain appeals from such courts can be had only upon allowance of the appellate court. It would also mean that the federal district courts

are courts of final appeal as to matters from which appeals lie under section 250 of the Bankruptcy Act because appeals are allowable only at the discretion of the appellate court.

It is significant that, as conceded in petitioners' brief (p. 53), "this Court has never had occasion to decide expressly that the federal courts have the power, where equity requires, to limit the retrospective effect of an overruling decision of this Court". Many thousands of cases have been decided in this Court which in effect have overruled many more thousands of decisions of circuit courts of appeal. And in *no* instance has any court stated that the rights of parties are to be subsequently determined by the decisions which were overruled. It is apparent that this lack of authority is not due to accident but to the fact that the rule for which petitioners contend is fundamentally unsound and would inevitably produce highly undesirable results.

The overruling of their own decisions by courts of last appeal is unusual. Decisions of this Court which conflict with previous decisions of circuit courts of appeal are anything but unusual, since in most instances writs of certiorari are granted by this Court only when there has been a conflict in the decisions of the courts of the various circuits.

If persons relying upon the earlier decisions of the circuit courts of appeal which are in conflict with later decisions of this Court may have their rights determined by the overruled decisions of the circuit courts of appeals, uncertainty will exist for a number of years as to the law applicable to a given situation; our courts will be clogged with cases in which the issue will be whether one of the parties relied on the decision which was subsequently overruled. And even if one of the parties did rely on the erroneous decision, it would not be fair or equitable, or in conformity with justice, to deprive the other party, who was not responsible for such reliance, of the rights which this Court states he has. If one of two innocent parties

must suffer because of the error of one of them, there is no principle at law or in equity which requires us to hold that the innocent party should suffer for the benefit of the party who erred.

Even the highest court of a state is not a court of final appeal, within the principle contended for, as to questions which may be reviewed by this Court. See *Evans* v. *Supreme Council, Royal Arcanum*, 223 N. Y. 497, 503, in which the New York Court of Appeals held that reliance upon its previous decision, subsequently reversed by this Court, was no protection to the person relying thereon.

Although this Court did not discuss the question, its decision in *Alaska Packers Asso.* v. *Pillsbury*, 301 U. S. 174, in actual effect upheld the contention of respondents herein. In that case this Court reversed the Circuit Court of Appeals and directed the dismissal of an appeal taken to that court without allowance, although the appellant below had taken the appeal as of right in conformity with a rule of the Circuit Court of Appeals directing that such appeals be taken in such manner.

Respectfully,

JOHN GERDES,
Counsel for Respondents

December 4, 1940.

APPENDIX A

Bankruptcy Act, Sec. 24, prior to its amendment by the Act of May 27, 1926 (30 Stat. 553):

"Sec. 24. Jurisdiction of Appellate Courts.

"(a) The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

"(b) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Bankruptcy Act, Sec. 24, as amended by the Act of May 27, 1926 (44 Stat. 664):

"Sec. 24. Jurisdiction of Appellate Courts.

"(a) The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"(b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 25) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 25 to be allowed in the discretion of the appellate court.

"(c) All appeals under this section shall be taken within thirty days after the judgment, or order, or other matter complained of, has been rendered or entered."

Bankruptcy Act, as amended by the Act of June 22, 1938 (c. 575, 52 Stat. 840; 11 U. S. C. 47, 48, 521, 650):

"Sec. 24. Jurisdiction of Appellate Courts.

"a. The Circuit Court of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

"c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

"Sec. 25. Practice on Appeals

"a. Appeals under this title to the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.

"b. Receivers and trustees shall not be required in any case to give bond when they take appeals."

* * * * *

"Sec. 121. Appellate Jurisdiction.

"Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

* * * * *

"Sec. 250. Appeals.

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

General Order in Bankruptcy No. 36 prior to the amendment effective as of February 13, 1939:

"36. Appeals.

"Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in courts of the United States."

General Order in Bankruptcy No. 36 after the amendment effective as of February 13, 1939:

"36. Appeals.

"Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the United States, including the Rules of Civil Procedure for the District Courts of the United States."

Rule 73(a) of the Federal Rules of Civil Procedure:

"Rule 73. Appeal to a Circuit Court of Appeals.

"(a) How Taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule, or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

APPENDIX B

Bankruptcy Cases Holding That Failure to Apply for Leave Within the Statutory Period Is Jurisdictional and Requires Dismissal of the Appeals.

First Circuit

Ahlstrom v. Ferguson, 29 F. (2d) 515;
Yglesias & Co. v. Eneglotaria Medicine Co. Inc., 73 F. (2d) 485, pet. for reh. den. 74 F. (2d) 635, cert. den. 295 U. S. 739;
Gorbea v. Soto Gras, 82 F. (2d) 634.

Second Circuit

In re Torgovnick, 49 F. (2d) 211;
In re Federal Photo Engraving Corp., 54 F. (2d) 628;
In re Weinstock, 56 F. (2d) 829;
In re Books, 72 F. (2d) 363;
In re Roe, 87 F. (2d) 693;
In re Combs, 88 F. (2d) 417, cert. den. 302 U. S. 683;
In re C. M. Piece Dyeing Co., 89 F. (2d) 37;
In re Postal Telegraph & Cable Corp., 89 F. (2d) 183;
In re Connecticut Co., 95 F. (2d) 311, cert. den. 304 U. S. 571.

Third Circuit

Jurgenson v. National Oil & Supply Co., 63 F. (2d) 727;
Stein v. Gaetje, 96 F. (2d) 877;
Noble v. Hopewell Nat. Bank, 98 F. (2d) 623;
In re Donahoe's, Inc., 110 F. (2d) 813.

Fourth Circuit

Wingert v. Smead, 70 F. (2d) 351, cert. den. 293 U. S. 567;
Milbank, Tweed & Hope v. McCue, 111 F. (2d) 100.

Fifth Circuit

Shoreland Co. v. Conklin, 30 F. (2d) 489.

Sixth Circuit

Deeley v. Cincinnati Art Pub. Co., 23 F. (2d) 920;
Humber v. Bankers' Trust Co., 70 F. (2d) 265;
Capital Endowment Co. v. Kroeger, 86 F. (2d) 976.

Seventh Circuit

In re Perlman, 68 F. (2d) 729;
In re Johanson, 77 F. (2d) 204;
In re Wilson-Sheridan Hotel Co., 86 F. (2d) 898, aff'd 301 U. S. 172;
In re Kenmore Granville Hotel Co., 90 F. (2d) 151;
In re Glen Sheridan Realty Trust, 90 F. (2d) 466, cert. den. 302 U. S. 727;
In re Grocery Center, Inc., 91 F. (2d) 176, cert. den. 302 U. S. 727;
In re Fearheiley, 97 F. (2d) 231.

Eighth Circuit

Broders v. Lage, 25 F. (2d) 288;
Stanley's Incorporated Store No. 3 v. Earl, 25 F. (2d) 458, cert. den. 278 U. S. 637;
Raich v. Olson, 25 F. (2d) 865;
American State Bank v. Ullrich, 28 F. (2d) 753;
Gate City Clay Co. v. Dickey, 39 F. (2d) 581;
Schnurr v. Miller, 49 F. (2d) 109;
Hunter v. Commerce Trust Co., 55 F. (2d) 1;
In re Schute-United, Inc., 59 F. (2d) 553;
Hudspeth v. Woods, 70 F. (2d) 504;
Vitagraph, Inc. v. St. Louis Properties Corp., 77 F. (2d) 590;

Credit Alliance Corp. v. Atlantic, Pacific & Gulf R. Co., 77 F. (2d) 595;
St. Louis Can Co. v. General American Life Ins. Co., 77 F. (2d) 598;
Hey v. Ward, 84 F. (2d) 193;
Griffith v. Equitable Life Assurance Society, 91 F. (2d) 9;
Schoppe v. First Trust Co., 101 F. (2d) 417.

Ninth Circuit

Standard Sanitary Mfg. Co. v. Momsen-Dunnegan-Ryan, 51 F. (2d) 684;
In re Miller & Harbaugh, 56 F. (2d) 141;
In re Interstate Oil Corp., 63 F. (2d) 674;
Wilkerson v. Cooch, 78 F. (2d) 311;
Robinson v. Edler, 78 F. (2d) 817;
In re Harris, 78 F. (2d) 849;
Raentsch v. American Co., 82 F. (2d) 770;
Bank of American Nat. Trust & Savings Assn. v. Cuccia, 90 F. (2d) 100;
Harrison Securities Co. v. Spinks Realty Co., 92 F. (2d) 904;
In re National Finance & Mortgage Corp., 96 F. (2d) 74.

Tenth Circuit

In re Merchants' Oil Co., 36 F. (2d) 655;
Quarles v. Dennison, 45 F. (2d) 585;
Mason v. Hardy-Griffin-Sheff, 45 F. (2d) 587;
Marcy v. Miller, 95 F. (2d) 611.

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SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1940.

Reconstruction Finance Corporation, Prudence-Bonds Corporation, President and Directors of the Manhattan Company, et al., Petitioners,

vs.

Prudence Securities Advisory Group, Independent Prudence Bondholders Committee, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

Dickinson Industrial Site, Inc. v. *Cowan*, 309 U. S. 382, decided on March 11, 1940, held that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act (52 Stat. 840) may be had only at the discretion of the Circuit Court of Appeals. Prior to that decision the Circuit Court of Appeals for the Second Circuit had held that appeals from such orders (involving $500 or more) could be had as a matter of right. *London* v. *O'Dougherty*, 102 F. (2d) 524. Subsequent to the decision in the *London* case and prior to the decision of *Dickinson Industrial Site, Inc.* v. *Cowan, supra*, petitioners endeavored to take appeals from compensation orders, which had been entered in reorganization proceedings under former § 77 B (48 Stat. 912), by filing within the appeal period provided by § 25(a) of the Bankruptcy Act, notices of appeal in the District Court. No application for leave to appeal was made to the Circuit Court of Appeals at any time. Some of the appeals were argued in May, 1939, the balance in February, 1940, some of the notices of appeal having been filed in the District Court in March, 1939, and some in November, 1939. While the matter was under advisement in the Circuit Court of Appeals we decided *Dickinson Industrial Site, Inc.* v. *Cowan, supra*. Thereupon certain respondents moved for dismissal of the appeals for want of jurisdiction. All of the appeals were

dismissed, some on those motions and some by the court *sua sponte*. 111 F. (2d) 37. The case is here on petition for certiorari which we granted in view of the importance of the procedural problem in administration of the Bankruptcy Act and of the asserted substantial conflict of the decision below with *Baxter* v. *Savings Bank*, 92 F. (2d) 404, and *Wilson* v. *Alliance Life Ins. Co.*, 102 F. (2d) 365, decided by the Circuit Court of Appeals for the Fifth Circuit.

Sec. 250 of the Chandler Act provides that appeals from compensation orders "may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals." Petitioners contend that when § 250 states that such appeals may be taken "in the manner . . . provided for appeals by this Act", it necessarily makes applicable § 24(b) which provides that such appellate jurisdiction shall be exercised "by appeal and in the form and manner of an appeal". They argue, therefore, that Rule 73(a) of the Federal Rules of Civil Procedure, which allows an appeal to be taken "by filing with the district court a notice of appeal" in those cases where an "appeal is permitted by law from a district court to a circuit court of appeals", governs appeals under § 250 as well as other appeals, since General Order No. 36 makes those rules applicable to appeals in bankruptcy, "except as otherwise provided in the Act". In our view, however, Rule 73(a) is not applicable to appeals under § 250 (see 2 Collier on Bankruptcy (14th ed.) p. 918) for they are permissive appeals which may be had not as of right but only in the discretion of the Circuit Court of Appeals. Since § 250 provides that they may "be taken to and allowed by the circuit court of appeals", the proper procedure for taking them is by filing in the Circuit Court of Appeals, within the time prescribed in § 25(a), applications for leave to appeal, not by filing notices of appeal in the District Court as was done here. As respondents maintain, that is the fair implication from our conclusion in *Dickinson Industrial Site, Inc.* v. *Cowan*, *supra*, at p. 385, that such appeals "may be had only at the discretion of the Circuit Court of Appeals." But while the appeals under § 250 must be "taken to" the Circuit Court of Appeals within the time prescribed in § 25(a) we do not think it is the fair intendment of that section that they must also be "allowed" within that time. Cf. *In re Foster Const. Corp.*, 49 F. (2d) 213; *Price* v. *Spo-*

kane Silver & Lead Co., 97 F. (2d) 237. If that were true, the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted.

The court below was in substantial agreement with the foregoing construction of § 250. It went on to hold, however, that since petitioners did not seek an allowance of their appeals in that court within the time prescribed in § 25(a), it had no jurisdiction to allow them. We take a different view.

The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice. Cf. *Taylor* v. *Voss*, 271 U. S. 176, dealing with appeals and petitions for revision under earlier provisions of the Act. In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. Hence it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty*, *supra*. This conclusion does not do violence to *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172. As we indicated in *Dickinson Industrial Site, Inc.* v. *Cowan*, *supra*, the *Shulman* case stated the rule of permissive appeals which was carried over into § 250. The failure to comply with statutory requirements, however, is not necessarily a jurisdictional defect. Cf. *Alaska Packers Ass'n* v. *Pillsbury*, 301 U. S. 174.

For the reasons stated, we hold that the Circuit Court of Appeals had the power to allow the appeals.

Reversed.

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SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1940.

Reconstruction Finance Corporation, Prudence-Bonds Corporation, President and Directors of the Manhattan Company, et al., Petitioners, *vs.* Prudence Securities Advisory Group, Independent Prudence Bondholders Committee, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Reed, concurring.

I am of opinion that timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and that the practice followed in this case cannot be reduced to a mere procedural irregularity. *Farrar* v. *Churchill*, 135 U. S. 609, 612-13; *Old Nick Williams Co.* v. *United States*, 215 U. S. 541; *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172. However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London* v. *O'Dougherty*, 102 F. (2d) 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires. *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21; *Montgomery Ward & Co.* v. *Duncan*, No. 30 this term, decided December 9, 1940, p. 9. In rare instances such as the case at bar this power is appropriate for curing even jurisdictional defects. Cf. *Rorick* v. *Commissioners*, 307 U. S. 208, 213.

Mr. Justice Roberts joins in this opinion.